IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Devilal & ors. vs. Kishanlal & ors.

S.B. Civil Second Appeal No.7/1982 against the judgment and decree dated 7.9.1981 passed by the learned Addl. District Judge, Bhilwara in Civil Appeal No.11/1979.

Date of Judgment: March 07, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr. G.Vaishnav for the appellants.
Mr. Rajat Dave for Mr. M.S.Singhvi for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The appellants are aggrieved against the dismissal of the suit seeking decree for pre-emption by the trial court vide judgment and decree dated 4.12.1978 and dismissal of the first appeal by the first appellate court by the judgment and decree dated 7.9.1981.

Brief facts of the case are that as per the plaintiffs, the suit property was purchased by the plaintiffs Bhura Lal and his brother Moti Lal. They started living in the said property from the date of purchase of the property,i.e. from 2.7.1974. The property was never partitioned but because of no good relations between Moti lal and his brother's wife Smt. Sosar, they started their separate kitchen. Moti Lal died and

thereafter Moti Lal's wife Smt. Sosar(defendant no.3) sold the property to defendant nos.1 and 2 for consideration of Rs.1500/- by registered sale-deed dated 15.6.1972. According to the plaintiffs, since the plaintiffs are co-sharers in the suit property, therefore, they have right to purchase the said sold property under the provisions of the Rajasthan Pre-emption Act, 1966 (for short "the Act of 1966"). It is also submitted that no notice before sale of the property in dispute as required under Section 8 of the act of 1966 was given to the plaintiffs by the seller or even by the purchasers, therefore, they are entitled to purchase the property.

The defendants submitted written statement and pleaded that the suit property was partitioned between the plaintiffs Bhura Lal and Moti Lal, about 25 years ago and, therefore, the plaintiffs are not co-sharers in the suit property. The defendants purchasers also pleaded that they invested money after purchase of the property and the plaintiff never objected to it.

The trial court as well as the first appellate court both held that the suit property was orally partitioned between plaintiffs Bhura Lal and his brother Moti Lal, therefore, the plaintiffs are not entitled to purchase the property in dispute, as the plaintiffs are not co-sharers which is the foundation for seeking pre-emption in the case set up by the plaintiffs. The courts below also held that since there is one shop in

the suit property, therefore, the suit for pre-emption for commercial premises is not maintainable.

Since two courts below decided against the present appellants-plaintiffs, therefore, this second appeal. The second appeal was admitted by this Court on 9.2.1982 by framing the following substantial question of law :-

> *"Whether on the facts and in the circumstances of the case, the learned Addl. District Judge, Bhilwala, was not right in confirming the judgment and decree of dismissal of the plaintiffs' suit on September 7, 1982, for preemption as s.5 of the Rajasthan Preemption Act (No.I of 1966) is not attracted ?"*

According to the learned counsel for the appellants, the two courts below committed serious error of law in drawing inference of partition despite the fact that partition deed was not produced by the defendants after admitting existence of the partition deed. It is also submitted that the two courts below had erred in law in holding that since there is a shop in the house which in fact is not, therefore, the suit of the plaintiff under the provisions of the Act of 1966 is not maintainable. It is also submitted that even if there is shop in the suit property then also nature of the sold property is not commercial merely because of one shop in the residential property.

The learned counsel for the respondents submitted that the two

courts below, after appreciation of the evidence after relying upon the gift-deed which was executed by Moti Lal in his life time and that is in the year 1953 in his daughter's favour, held that the suit property was partitioned. It is also submitted that site was inspected by the court and the court relied upon that evidence which corroborate the evidence produced by the plaintiff which proved the partition of the property. It is also submitted that the suit property consists of one shop also, therefore, also the suit of the plaintiffs was not maintainable.

I considered the submissions of the learned counsel for the parties and perused the record and also gone through the statements of the witnesses.

At the out set, it may be stated that the plaintiffs' case was that the plaintiffs are the co-sharers in the suit property whereas in fact the suit was filed by Bhura Lal and his son Devi Lal. Said Devi Lal is admittedly not the purchaser of the property with Bhura Lal and Moti Lal. Nothing has been pleaded how Devi Lal became co-sharer in the property in the life time of Bhura Lal. It appears from the judgments of the two courts below that both the courts failed to notice Section 16 of the Act of 1966 which provides that where person having right of pre-emption sues jointly with the person not having such right, he shall lose his right. The suit of the plaintiffs should have been dismissed only on this statutory bar.

Be it as it may be, the defendants came with a case that the suit property was partitioned for which they produced the evidence but before that it will be worthwhile to mention here that the plaintiffs in their plaint clearly stated that because of no more good relations between the wife of Moti Lal Smt. Sosar, Moti Lal and Bhura Lal plaintiffs started separate kitchen. At this stage, it will be further relevant to mention here that the said separation of kitchen was not after the death of Moti Lal but was in the life time of Moti Lal. The plaintiffs did not plead when Moti Lal died. Be it as it may be, the plaintiff in his statement admitted that Moti Lal died in the Samvat Year 2010. The property was sold by Smt. Sosar to defendant nos.1 and 2 in the year 1972 which appears to be after about 20 years from the time of death of Moti Lal. Before that Moti Lal gifted the property in dispute to his daughter and executed a gift deed(Ex.A.1) in favour of his daughter. Said deed was admitted in evidence without any objection and interestingly said deed was never challenged by the plaintiffs in any manner even after knowledge of the said gift deed. The daughter of Moti Lal died and according to Smt.Sosar, she paid cost of the property to the husband of her daughter (son-in-law of Moti Lal and his wife Smt.Sosar). The authority of Smt.Sosar to sell the property is not under challenge, therefore, validity of the sale-deed executed in favour of defendant nos.1 and 2 dated 15.6.1972 is under challenge. Therefore, in

these circumstances, the gift deed executed by Moti Lal in his life time was relevant for collateral purpose for finding the nature of the possession of Moti Lal during his life time till he gifted the property to his daughter. Moti Lal in his gift deed of the year 1953 stated that he is the owner of the property and that fact was considered by the two courts below and inference was drawn that property could have been gifted by Moti Lal only after partition of the property. It is not the case of any of the parties that Moti Lal ousted Bhura Lal, his brother at any point of time, therefore, reasonable inference could have been drawn is about the partition only. Coupled with this fact, site inspection report also clearly suggests that the property was partitioned.

In view of the above, since the plaintiffs failed to prove that they are co-sharers in the sold property, the two courts below were right in dismissing the suit of the plaintiffs and has not committed any error of law.

In view of the above, the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.